SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No.: 100292/10
Motion No.:001

PS FINANCE LLC,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

PARKER, WAICHMAN ALONSO, LLP,
JOHN A. MULLEN, ESQ.,
RAYMOND C. SILVERMAN, ESQ.,
FRED R. ROSENTHAL, ESQ.,
JERROLD S. PARKER, ESQ.,
HERBERT L. WAICHMAN, ESQ., and
ANDRES F. ALONSO, ESQ.,

Defendant

The following items were considered in the review of the following motion to dismiss.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Memorandum of Law	4
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants' move to dismiss the plaintiff's complaint pre-answer, pursuant to CPLR § 3211(a)(1) and (7). The court will not convert this motion into one for summary judgment. The defendants' motion is denied.

Facts

The plaintiff is engaged in the business of providing emergency, non-recourse funding to plaintiff's in personal injury actions. The defendants in this action represented Timothy and Ruth

Ann Farmer as plaintiffs in a personal injury action. The action was commenced in the New York State Supreme Court, Queens County and assigned Index Number 643/02. While the action was pending in Queens County Supreme Court the defendants' client, Timothy Farmer signed six funding agreements with the plaintiff: as follows: June 18, 2002, $28,000 with a usage fee of 3.5% per month compounding monthly; November 22, 2002, $1250, with a usage fee of 3.5% per month compounding monthly; January 23, 2003, $1250 with a usage fee of 3.5% per month compounding monthly; April 29, 2003 $1,250 with a usage fee of 3.75% per month compounding monthly; August 28, 2002, $1250 with a usage fee of 4.0% per month compounding monthly; and June 24, 2004, $1750, with a usage fee of 4.0% per month compounding monthly. A total of $34,750 was lent by the plaintiff to Timothy Farmer. The plaintiff took the necessary steps to inform the defendants about its liens on any proceeds recovered on behalf of plaintiff, Timothy Farmer. And the defendants acknowledged the liens held by the plaintiff.

Timothy Farmer's current wife, Ruth Ann Farmer, was not a signatory to any of the six funding agreements between the plaintiff and her husband. On June 26, 2007 the case was settled on the record before Justice Kevin Kerrigan. At that time the following testimony was taken:

> Q. Tim, are you aware I've advised you that the defendants in this case have offered a total settlement of $192,000 to settle your claims against the defendants?
>
> A. Yes.
>
> Q. And I've advised you that the settlement is to be broken down with 125,000 being paid on behalf of the defendant, City of New York, $62,500 being paid on behalf of the defendant, Scaturo and Sons, and $5000 being paid on behalf of the defendant, All in One Business Services?
>
> A. Yes.
>
> Q. And Tim, you are aware that this settlement offer reflects

the significant liability and damages issues with respect to the case you have commenced against these defendants?

A. Yes, I do.

Q. And you are aware that the offer, Tim, is in full settlement of any and all claims made on behalf of both yourself and your wife, Ruth Ann Farmer as a result of your accident on March 8, of 2001?

A. Yes, I do.

Q. And am I correct, Mr. Farmer, that you have requested that the settlement be broken down so that $100,00 is allocated to your claim for personal injuries, and $92,000 is allocated to your wife's loss of services claim?

A. Yes.

Q. And, Tim, can you tell us why you have requested that?

A. Because of the accident of March 8, a lot of the things that I normally do fell to my wife. I was laid up for a long time, to normal taking case of my household duties, being a father, all of those things fell to my wife. She's had it just as hard, if not harder, than I have.[1]

Although Mr. Farmer's case settled for $100,000 only $95,000 was collected. After disbursements of $7,982.49 and attorney's fees of $29,005.84, Mr. Farmer's share of his settlement proceeds was $58,001.67. The defendants state that $27,570.99 was taken directly by the City of New York Department of Finance for a child support lien. The remaining $30,440.68 was sent to the plaintiff, but not deposited.

In the interim the plaintiff through its principal, Carmine DeSantis, filed a grievance in the Grievance Committee for the Tenth Judicial District against Raymond C. Silverman, Esq. an attorney at the defendant firm. The matter was referred to the Nassau County Bar Association's

[1] Testimony of Timothy Farmer, June 26, 2010.

Grievance Committee, which determined that there was not a breach of the Code of Professional Responsibility without conducting a hearing.

The plaintiff brought this action alleging six causes of action against all defendants: 1) Conversion, 2) Tortious Inducement to Breach Contract; 3) Breach of Contract; 4) Negligence; 5) Breach of Acknowledgments; and 6) Tortious Interference with Contractual Relations. The defendants bring this pre-answer motion to dismiss the plaintiff's complaint alleging that documentary evidence establishes that the plaintiff's causes of action have no merit; and alternatively that the plaintiff's complaint fails to state a cause of action.

Discussion

In the first instance the defendants move to dismiss the plaintiff's complaint by alleging that documentary evidence resolve all issues of fact in their favor pursuant to CPLR § 3211(a)(1). In order to prevail on a motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1), the moving party must show that the documentary evidence conclusively refutes the plaintiff's allegations.[2]

Here, the defendants rely on the decision of the Nassau County Bar Association's Grievance Committee that did not find a breach of the Code of Professional Responsibility in connection with the Farmers' settlement and on the settlement on the record before Justice Kerrigan. The court finds the submitted evidence insufficient to support dismissal pursuant to CPLR § 3211(a)(1).

The Appellate Division, Second Department, in *Bennardo v. Equitable Land Services, Inc.* held that grievance committee determinations that are summary in nature and conducted

[2] *AG Capital Funding Parnters, L.P. v. State Street Bank and Trust Co.,* 5 NY3d 582 [2005].

without the benefit of a hearing are not afforded res judicata or collateral estoppel effect on the issues raised in civil actions.[3] Here, the grievance committee made its determination solely on documentary evidence without the benefit of a hearing. As such, the Nassau County Bar Association's Grievance Committee's findings cannot support a motion to dismiss pursuant to CPLR § 3211(a)(1).

The settlement on the record is also insufficient to support the defendants' motion. The plaintiff's complaint at paragraph 44 alleges as follows:

> Under the direct supervision and control of Parker, Waichman, Alonso and/or Rosenthal, Silverman, Mullan and/or other attorneys at PWA [Parker, Waichman & Alonso], who had knowledge of the Funding Agreements, induced Farmer to violate the Funding Agreements by allocating portions of the Lawsuit's settlement proceeds to his wife, Ruth Ann Farmer, as he had already assigned those proceeds to PSF.

The defendants argue that the settlement on the record demonstrates the legitimacy of the settlement and its apportionment. And further asserts that as the attorneys for both plaintiffs they had a duty and obligation to maximize secure and protect the wife's funds for the settlement of her derivative loss of services claim.

The plaintiffs' complaint does not take issue with the total settlement amount of $192,000. But rather the plaintiff alleges that Timothy Farmer's decision to divide the $192,000 settlement in the manner in which he did is actionable. This court agrees that a settlement on the record does not dispense with the factual inquiry into the motivation of Timothy Farmer to divide the total settlement in the manner in which he chose. As such, dismissal pursuant to CPLR § 3211(a)(1) is denied.

The defendants also move to dismiss the plaintiff's complaint arguing that each and every

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[3]244 AD2d 304, [2d Dept. 1997].

cause of action alleged in the plaintiff's complaint fails to state a cause of action on which relief can be granted pursuant to CPLR § 3211(a)(7). On a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the court must accept as true the facts alleged in the pleadings and submissions in opposition to the motion, and accord the plaintiff every possible inference.[4]

Here, the defendants argue that the plaintiff does not have a right to the settlement monies designated for Ruth Ann Farmer because it never contracted with her. And that there are no contractual obligations running between the defendants and the plaintiff.

It must first be noted that the plaintiff's purported fifth cause of action for "breach of acknowledgments" is subsumed into the plaintiff's third cause of action for "breach of contract".

This factual situation presents the court with a case of first impression in New York to determine whether a pre-settlement funding company may maintain an action against a plaintiff's law firm that represents both a husband's personal injury action and a wife's derivative loss of services action where both parties are not signatories to the litigation funding agreements.

Professor Susan Lorde Martin of Hofstra University, produced a succinct summary of the litigation financing business that states:

> The litigation financing firms make non-recourse loans to plaintiffs in exchange for a share of proceeds of their lawsuits, if there are any. If a plaintiff loses, nothing is repaid, and the lender loses the money advanced. These arrangements have been problematic because they violate state prohibitions against champerty, an agreement in which a third party provides support for another's litigation in exchange for part of the proceeds. In addition, although these funding arrangements specifically do not contain an

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[4] *Kevin Spence & Sons, Inc. v. Boar's Head Provisions Co.,* 5 AD3d 352, [2d Dept. 2004].

> absolute obligation on the part of the borrower to repay the amount of money advanced, a basic element in the definition of usury, some courts have viewed the arrangement as usurious.[5]

The causes of action asserted by the plaintiff in its complaint rely on a judicial interpretation that allocation of $92,000 to Ruth Ann Farmer was designed to prevent the plaintiff from recovering on its agreements with Timothy Farmer. The payment of $92,000 to Ruth Ann Farmer for her derivative loss of services claim constitutes a pay out of approximately 47% of the total settlement.

This case is similar to that of *Miszko v. Gress,* the Appellate Division, Third Department reversed a trial court's allocation of settlement proceeds.[6] In *Miszko*, the plaintiff was injured in the course of his employment as a state trooper. He received workers compensation benefits from the New York State Insurance Fund (the Fund). In addition to his workers' compensation claims the plaintiff commenced an action for personal injuries that included a derivative claim for his wife's loss of services. Unlike the case at bar, the Fund had a statutory lien on any recovery in the plaintiff's case and required its prior consent before settling. Through negotiations the plaintiff's lawyers arranged for a settlement of $25,000 and the Fund would receive $14,866.67. But the plaintiff refused to endorse the settlement check. Subsequent motion practice led to the Supreme Court to issue an order allocating 30% of the total settlement to the plaintiff's wife's derivative claim. The settlement monies allocated to the wife in her derivative claim is not subject to the Fund's lien and thereby reduced the Fund's share to $10,480.83, a difference of $4,385.84. As the Fund had a statutory lien and any settlement required consent it appealed the Supreme Court's allocation of settlement monies.

In reversing the Supreme Court's findings the Appellate Division, Third Department held

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[5]Martin, *Litigation Financing: Another Subprime Industry That Has a Place In the United States Market*, 53 Vill.L.Rev. 83, 83-84 [2008](internal citations omitted).

[6] 4 AD3d 575, [3d Dept 2004].

that the payment of 30% of the total net recovery, after disbursements and counsel fees, to a wife's derivative claim was excessive and reduced the recovery to 10%. In reducing the settlement amount the court considered the extent of the plaintiff's injuries, his continued disability and the proof submitted by the wife in support of her claim.

Here, the plaintiff alleges that the defendants purposefully engaged in a course of conduct to prevent it from collecting on its funding agreement with Timothy Farmer. Unlike the Fund in *Misko* the plaintiff could not appeal the settlement determination as its agreement with Timothy Farmer prevents it from influencing settlement negotiations. Given the paucity of the record supporting the settlement in the underlying action, this court cannot dismiss the plaintiff's causes of action absent any discovery.

Furthermore, it must be determined whether a conflict of interest existed at the time the defendants negotiated the underlying settlement. Here, it is undisputed that Timothy Farmer executed pre-settlement funding agreements with the plaintiff that did not include his wife Ruth Ann Farmer as a signatory. As the defendants point out they had a duty to maximize her recovery. It can also be argued that the same duty was owed to Timothy Farmer. Whether a law firm can continue to represent two plaintiffs after only one executes a pre-settlement funding agreement requires additional discovery.

Conclusion

The defendants motion to dismiss must be denied. The settlement on the record of the underlying case, and the Nassau County Bar Association's Grievance Committee's finding that there was no breach of the Code of Professional Responsibility, do not, on their face, refute the plaintiff's allegations in its complaint. In the context of a motion to dismiss for failure to state a cause of action, the court must afford the pleadings a liberal construction, interpret the allegations of the complaint as true, and provide the plaintiff the benefit of every possible

inference. Whether a plaintiff can ultimately establish its allegations is not part of the calculus.[7]

Accordingly, it is hereby:

ORDERED, that the defendants' motion to dismiss is denied; and it is further

ORDERED, that the plaintiff's fifth cause of action alleging breach of acknowledgments is incorporated into the plaintiff's third cause of action for breach of contract; and it is further

ORDERED, that the defendants' shall answer the plaintiff's complaint forthwith; and it is further

ORDERED, that the parties shall appear in DCM Part 3 on **Tuesday, August 10, 2010 at 9:30 a.m. for a Preliminary Conference.**

ENTER,

DATED: June 28, 2010

Joseph J. Maltese
Justice of the Supreme Court

[7] *EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11 [2005].